

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-1955

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In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

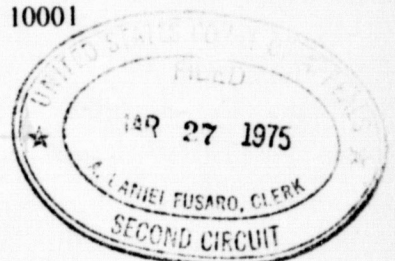
ROBERT VISSA,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

APPELLANT'S APPENDIX

THOMAS J. O'BRIEN
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DOCKET ENTRIES

THE UNITED STATES

vs.

JAMES ADAMS, RICHARD BELANGER,
NICHOLAS CALABRO, DOMINIC
MECCA, RICHARD PALMER, STEVEN
SMITH, GARY STEPHAN PAUL
STEPHAN, ROBERT VISSA, ROBERT
WILNER and JOHN DOE, a/k/a
"Anthony".

73 CRIM. 1102

PROCEEDINGS

12- 7-73 Filed indictment.

12-17-73 Adams(
 Mecca(
 Calabro(No appearance by attorneys.
 Belager((sic) Court directs entry of not
 John Doe(guilty pleas.
 Vissa(
 Smith(

Mecca - continued on bail fixed by Mag. (\$10,000.
secured by \$500.)

Palmer - (atty. present) Pleads not guilty.
Cont'd on bail fixed by Mag. (10,000 P.R.B.
secured by 10%)

12-17-73 Wilner (atty. present) Pleads not guilty.
 Bail continued (\$5,000 P.R.B.)

Gary and Paul Stephan (Court directs entry of
not guilty Plea. Bail continued as set by Mag.
Paul Stephan \$10,000. P.R.B. secured by \$500.
and Gary Stephan \$10,000. P.R.B. secured by
10%.

Motions returnable in 30 days. Case assigned to Judge Lasker for all purposes. Frankel, J.

- 1- 7-74 RICHARD PALMER - Filed notice of appearance by Warren B. Silbericlett, 200 Mamaroneck Ave., White Plains, N.Y. 10601. 914-RO 1-1771.
- 1- 9-74 VISSA - PLEADS NOT GUILTY - P.R.B. of \$2,500.
BELANGER - Pleads not guilty - P.R.B. \$2,500.
CALABRO - Pleads not guilty.
WILNER - Pleads not guilty. LASKER, J.
- 1-11-74 SMITH - Deft. pleads not guilty - P.R.B. \$2,500, LASKER, J.
- 1-15-74 ROBERT VISSA - Filed deft. motion to inspect Grand Jury Minutes Dismissing indictment. Granting B/P, etc. (with statement) (No Affdvt.)
- 2- 1-74 PAUL STEPHAN - Filed notice of motion and affdvt. for discovery.
- 2- 1-74 PAUL STEPHAN - Filed memo of law.
- 2-19-74 DOMINIC MECCA - Filed notice of motion for b/p, & affdvt. in support.
- 1-21-74 STEPHAN SMITH. Filed CJA Form #20, appointment of counsel Stuart R. Shaw, 233 B'Way., N.Y.C. 10007 233-8991. LASKER, J.
- 2- 1-74 Filed the following papers received from U.S. Magistrate: Docket Sheet, Indictment Warrent, Disposition Sheet, Notice of Appearance and Appearance bond G.S. \$10,000, D.M. \$10,000., R.P. \$10,000., R.W. \$5,000., P.S. \$10,000, N.C. \$10,000., R.B. \$2,500.
- 3-15-74 RICHARD PALMER - Filed order extending bail

limits to Caribbean & South America from March 31-74 and to including 4-20-74. LASKER, J.

3-20-74 Filed Govt's memo of law in opposition to various motions.

4- 3-74 STEPHAN SMITH - Filed notice of motion for B/P. Ret. 4-15-74. With Affdvt.

4-24-74 STEPHAN SMITH - Filed affdvt. and notice of motion for dismissal of indictment, etc. ret. 5-3-74. Affdvt. in support.

4-26-74 ROBERT WILNER - Filed deft. affdvt. and notice of motion pursuant to R.14; Re.Trial.

4-26-74 ROBERT WILNER - Filed deft. memo of law.

5- 3-74 STEPHAN SMITH - Filed defts. memo of law in support of motion to dismiss indictment.

5-10-74 JAMES ADAMS - Filed CJA Form #21 Authorization and voucher for transcrip.(sic) LASKER, J.

6-20-74 RICHARD PALMER - Filed Judgment & Order of Probation (#74,558) - It is adjudged that the imposition of sentence of imprisonment is suspended and the Deft. is placed on Probation for a period of THREE (3) YEARS subject to the standing probation order of the court and the Deft. is FINED the sum of \$2,500.00 to be paid within ninety (90) days hereof or the Deft. is to stand committed. Count two (2) is dismissed on the motion of the deft. --- LASKER, J.

5- 6-74 RICHARD PALMER - (AUSA Pykell) Deft., (atty. present) pleads GUILTY to Count 1. Pre-sentence report ordered. Sentence date 6-14-74. Deft. R.O.R.

DOMINIC MECCA - Severed.

5- 6-74 Jury Trial begun for Deft's - BELANGER, CALABRO, SMITH, G. STEPHAN, P. STEPHAN, VISSA & WILNER. LASKER, J.

5- 8-74 Trial cont'd.

5- 9-74 Trial cont'd.

5-10-74 Trial cont'd.

5-13-74 Trial cont'd.

5-14-74 Trial cont'd.

5-15-74 Trial cont'd.

5-16-74 Trial cont'd.

5-17-74 Trial cont'd.

5-20-74 Trial cont'd.

5-21-74 Trial cont'd.

5-22-74 Trial cont'd.

5-23-74 Trial cont'd. Deft's CALABRO & SMITH, count 2 of Indictment dismissed, order of LASKER, J.

5-24-74 Trial cont'd. - Jury started deliberation at 4 PM and reached a verdict.

R. BELANGER - found GUILTY on Ct.1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 at 10 AM.

R. VISSA - found GUILTY on Cts. 1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 at 10 AM.

R. WILNER - found GUILTY on Cts. 1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 at 10 AM.

N. CALABRO - found NOT GUILTY on COUNT 1.

S. SMITH - found NOT GUILTY on COUNT 1.

G. STEPHAN - found NOT GUILTY on COUNTS 1 & 2.

P. STEPHAN - found NOT GUILTY on COUNTS 1 & 2.
LASKER, J.

6-10-74 Filed transcript of record of proceedings dated
May 7, 8, 9, 10, 13, 14, 1974.

6-10-74 Filed transcript of record of proceedings dated
May 22, 23, 24, 1974.

7-12-74 RICHARD BELANGER - Filed Judgment & Commitment -
It is adjudged that the Deft. is hereby committed
to the custody of the Atty. General for imprison-
ment for a period of ONE (1) YEAR, on each
of Counts 1 & 2, said sentence to run concurrently
and not consecutively. At the expiration of
such custody, the Deft. shall serve a SPECIAL
PAROLE term of TWO (2) YEARS subject to the pro-
visions of Title 21, Sec. 841(a)(1)(B). LASKER, J.

7-12-74 ROBERT VISSA - Filed Judgment & Commitment -
It is adjudged that the Deft. is hereby committed
to the custody of the Atty. General for imprison-
ment for a period of ONE (1) YEAR and on the
condition that the Deft. be confined in a jail
or treatment type institution for a period of
SIX (6) MONTHS, the execution of the remainder
of the sentence of imprisonment is suspended
and the Deft. is placed on probation for a period
of SIX (6) MONTHS subject to the standing pro-
bation order of this court, and thereafter to
a TWO (2) YEAR SPECIAL PAROLE period subject
to the provisions of Title 21, Sec. 841(b)(1)
(B). Said sentences are to be served concurrently
and not consecutively.---LASKER, J.

7-12-74 RICHARD BELANGER - Filed Notice of Appeal to U.S.C.A., 2nd Circuit from a final Judgment of conviction dtd. 7-12-74. Deft. granted permission to file appeal in formi pauperis. LASKER, J. (Copies mailed)

7-15-74 ROBERT VISSA - Filed deft's notice of appeal from the judgment dated 7-12-74. Mailed Notice to Deft., c/o Vincent W. Lenna, 50 Riverdale Avenue, Yonkers, N.Y. and to to US Atty.

7-19-74 Filed govt's memo of law.

7-19-74 Filed Govt's affidavit in opposition to deft's (sic) Wilner's motion for severance pursuant to Fed. R. Crim. P.14.

7-23-74 Filed transcript of record of proceedings, dated May 6, 1974.

7-23-74 ROBERT VISSA - Filed Notice - The Record on Appeal has this day been certified and transmitted to the U.S.C.A. for the 2nd Circuit.

7-29-74 RICHARD BELANGER - Filed Notice that the Supplemental record on appeal has been certified and transmitted to the U.S.C.A. for the 2nd Circuit.

8-19-74 Filed transcript of record of proceedings, dated June 21, 1974.

6-21-74 RICHARD BELANGER - Mailed original CJA copy 1 to the A.O, Wash., D.C. for payment. LASKER, J.

8-13-74 RICHARD BELANGER - Filed CJA for service of Court Reporter on 1/9, 4/25, 5/2, 5/7. LASKER, J.

8- 1-74 AUSA Pykett, Deft. WILNER (Atty. James La Rosa (sic) present).

8-26-74 Stephan Smith - Mailed original CJA copy 1 to the A.O., Wash., D.C. for payment. LASKER, J.

8-26-74 Gary Stephan - Mailed original CJA copy 1 to the A.O., Wash., D.C. for payment. LASKER, J.

9- 4-74 DOMINIC MECCA - Filed Deft's motion to suppress for a Pretrial Hearing.

9- 5-74 DOMINIC MECCA-- Filed affdvt. of Daniel J. Pykett, Special Asst. U.S. Atty., in opposition to the motion of Deft. to suppress.

9-10-74 Richard Belanger - Notice to Docket Clerk the record has been certified and transmitted to USCA on 9-10-74.

9-10-74 Dominic Mecca - Memo-end on back of motion filed 9-4-74...Motion denied. It is So Ordered... Lasker, J.

9-16-74 DOMINIC MECCA - Jury trial begun - Lasker, J.

9-18-74 Trial cont'd. Deft's motion for enlargment of Bail + enconpass (sic) the Dist. of (illegible).

9-19-74 Trial cont'd.

9-20-74 Trial cont'd.

9-21-74 Trial cont'd.

9-23-74 Trial cont'd and concluded. Jury returned at 3:20 PM with a verdict of GUILTY on Counts 1 and 2. P.S.I. Ordered. Sentence adj'd. to 11/22/74 at 10:00 AM, Rm #1. Ba'l continued. LASKER, J.

10-17-74 RICHARD PALMER. Filed original Judgment and Order of Probation - Fine marked satisfied and entered in the money judgment book.

10-31-74 JAMES ADAMS - JOHN DOE - Closed statistically because defendant(s) is a fugitive. In all other respects this case is still pending.

11-22-74 DOMINIC MECCA - Filed Judgment & Commitment - It is Adjudged that the Deft. be committed to the custody of the Atty. General for a period of One (1) year on each of Counts 1 and 2, said sentence to run concurrently and not consecutive. At the expiration of such custody, the Deft. shall serve a Special Parole term of Two (2) Years subject to the provisions of Title 21, Section 841(b)(1)(B)---LASKER, J.

11-25-74 DOMINIC MECCA - Filed Notice of Appeal to U.S. C.A. for the Second Circuit from the sentence imposed 11-22-74. Deft. granted leave to appeal in forma pauperis -- LASKER, J.

11-26-74 ADAMS - Filed transcript of record of proceedings dated 1-11-74.

11-26-74 ADAMS - Filed transcript of record of proceedings dated 5-7-74.

11-25-74 ROBERT VISSA - Filed notice that the Supplemental Record on Appeal has been certified and transmitted to the U.S.C.A. for the 2nd Circuit.

12- 3-74 Filed transcript of record of proceedings dated July 12, 1974.

12- 2-74 ROBERT WILNER - Filed Judgment and Probation/Commitment Order - The Deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of ONE (1) YEAR on Count 1, but the execution of the sentence of imprisonment is suspended. The Deft. is placed on probation for a period of THREE(3) YEARS on Count 2.----LASKER, J.

12- 3-74 ROBERT WILNER - Filed Deft's Notice of Appeal from the Judgment of Conviction entered against Deft. on 12-2-74. (m/n to Deft. & Atty.)

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

JAMES ADAMS, RICHARD BELANGER,
NICHOLAS CALABRO, DOMINIC MECCA,
RICHARD PALMER, STEVEN SMITH, GARY
STEPHAN, PAUL STEPHAN, ROBERT VISSA,
ROBERT WILNER and JOHN DOE, a/k/a
"Anthony",

73 CR 1102

Defendants.
-----X

The Grand Jury charges:

1. From on or about the 1st day of August, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER, and JOHN DOE, a/k/a "Anthony", the defendants, and Gerald Mitchell and Richard Thurlow, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and

DOMINIC MECCA and co-conspirators (sic) Richard Thurlow went to Montego Bay, Jamaica, West Indies by boat.

2. In or about February, 1973, defendants JAMES ADAMS, DOMINIC MECCA and RICHARD BELANGER met and had a conversation in Florida.

3. In or about February, 1973, the defendant JAMES ADAMS paid defendant ROBERT WILNER approximately \$12,000.

4. In or about February, 1973, defendant ROBERT WILNER, as agent for Air Seas Charter Service, Inc., purchased a 24 foot Floton Seacraft boat in Ft. Lauderdale, Florida.

5. On or about March 6, 1973, defendant STEVEN SMITH and co-conspirator Richard Thurlow boarded a boat in Miami, Florida.

6. On or about March 7, 1973, defendant STEVEN SMITH and co-conspirator Richard Thurlow possessed approximately 700 lbs. of marijuana on Williams Island, Bahama Islands.

7. On or about May 13, 1973, defendants ROBERT WILNER and JOHN DOE, a/k/a "Anthony", boarded an airplane at John F. Kennedy International Airport in the City of New York and flew to Ft. Lauderdale, Florida.

8. In or about May, 1973, defendant JOHN DOE, a/k/a

"Anthony", and co-conspirator Gerald Mitchell drove from Ft. Lauderdale, Florida to the Rye Town Hilton Hotel in Portchester, Westchester County, New York.

9. In or about May, 1973, defendants ROBERT WILNER, DOMINIC MECCA and JOHN DOE, a/k/a "Anthony", and co-conspirator Gerald Mitchell met at the Rye Town Hilton Hotel in Portchester, Westchester County, New York and had a conversation.

10. In or about June, 1973, defendants ROBERT VISSA and NICHOLAS CALABRO and co-conspirator Gerald Mitchell drove from the State of Maine to Stamford, Connecticut where they met and had a conversation with defendants JOHN DOE, a/k/a "Anthony" and ROBERT WILNER.

11. On or about June 10, 1973, defendants JOHN DOE, a/k/a "Anthony", and GARY STEPHAN boarded a boat in Ft. Lauderdale, Florida.

12. On or about June 11, 1973, defendant ROBERT WILNER and co-conspirator Gerald Mitchell landed an airplane on Long Island in the Bahama Islands.

13. On or about June 11, 1973, defendants RICHARD PALMER and ROBERT VISSA landed an airplane on Long Island in the Bahama Islands.

14. In or about June, 1973, defendants PAUL STEPHAN,

DOMINIC MECCA, NICHOLAS CALABRO, ROBERT WILNER, ROBERT VISSA and RICHARD PALMER and co-conspirator Gerald Mitchell met at Pier 66 Hotel, Ft. Lauderdale, Florida and had a conversation.

15. In or about June, 1973, defendants GARY STEPHAN and JOHN DOE, a/k/a "Anthony" returned to Ft. Lauderdale, Florida by boat.

16. In or about June, 1973, co-conspirator Gerald Mitchell possessed approximately 260 pounds of marijuana.

(Title 21, United States Code, Sections 846 and 963).

SECOND COUNT

The Grand Jury further charges:

In or about the month of May, 1973, in the Southern District of New York, JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER, and JOHN DOE, a/k/a "Anthony", the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately

500 pounds of marijuana.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B)).

PAUL J. CURRAN
United States Attorney

FOREMAN

THE COURT: Ladies and gentlemen, I hope I didn't overwhelm you by saying before that my charge is 40 pages long. Actually that is by no means a long charge, but it is long enough. In these days, when the law has become more complicated than it was in pioneer days, it is highly desirable for a judge to read his charge so that there is no doubt in his own mind about what he is going to say, so that he takes into consideration everything that the parties want him to bring to the attention of the jury, and so that the law is stated as clearly as possible.

I say all this only because I would prefer to sit and talk to you the way I am doing now. I think it is a more effective way of communicating. But I don't think that I will be able to do that. I also say it because, since I am going to read my charge, I may get going a little too fast. If I do, will you please raise your hand so that I will know and be able to slow down, because I want you to pay attention carefully to what I have to say in this charge.

The game has been played. You have to judge it now and you have to know what rules to apply to the situation in order to be able to do justice or render a true verdict as you swore that you would.

Now, ladies and gentlemen, before I commence my charge proper I want to remind you that as a result of my

action, for reasons with which the jury is not concerned, the following facts are to be remembered:

First, I have stricken from the record, and you are not to be concerned with, any evidence relating to the events of August, 1971, or August, 1973.

Second, since I have excluded from your consideration the events of August, 1971, I have stricken from the indictment overt act number 1, which relates to those events. In my charge proper I will point out to you the significance of the overt acts in the indictment, and when we deliver the indictment to you we will, in order to be sure that you do not take overt act number 1 into consideration, blank it out.

Third, I want you to remember that the charges in count 2 no longer apply to Nicholas Calabra or Steven Smith.

Ladies and gentlemen, now that you've heard the testimony and the arguments of counsel, the time has come to instruct you as to the law governing the case. You've been chosen and sworn as jurors in this matter to try the issues presented by the allegations of the indictment, and on your determination of the facts, and I stress the words "your determination," to decide under the law as I shall instruct you whether the government has proven any of

1 the charges of the indictment against the defendants or
2 any of them beyond a reasonable doubt. I will discuss those
3 charges with you in a moment in detail, but before that
4 I want to give you a few important instructions.

5
6 First, that you are to perform your duties as
7 jurors without bias or prejudice to or for anybody, whether
8 the government or any of the defendants. The law does not
9 permit jurors, and you wouldn't want it to permit jurors,
10 to be governed either by sympathy or swayed by prejudice
11 or public opinion. In that connection I want to point out
12 that although this case involves marijuana, the subject
13 matter of the case has nothing to do with your deliberations
14 except that as one of the facts you must find as to
15 the substantive count, count 2, that indeed what was
16 possessed was marijuana, but you do not find the man any
17 guiltier or any less guilty because of the nature of the
18 charge. You only find him guilty if the government proves
19 the elements of the offense which I will specify for you
20 hereafter. So your personal attitudes on the subject about
21 which I examined you at great length, it seems to me, when
22 this jury was chosen, have nothing to do with the issues.

23 Second, we start with the proposition that we
24 started with at the outset of this trial, that is, that the
25 law presumes every defendant to be innocent of any charge

1 jgh9
2 against him. You will recall that when you were selected
3 I specifically asked each one of you if you could enter
4 into the discharge of your duties presuming each defendant
5 to be innocent unless proven guilty beyond a reasonable
6 doubt after your own deliberations, and each of you gave
7 me the answer yes.

8 This presumption of innocence is sufficient to
9 acquit any defendant unless and until you as jurors have
10 unanimously satisfied yourselves beyond a reasonable doubt
11 of that particular defendant's guilt on that particular charge
12 from all of the evidence which has been presented. The
13 burden, or responsibility, is on the government to prove,
14 if it can, each defendant guilty beyond a reasonable doubt
15 of every essential element of each crime charged, and I
16 will of course advise you later in this charge just what
17 elements there are to each crime.

18 Third, I also want to remind you of what I
19 mentioned at the outset of the trial, that is, that the
20 existence of an indictment does not constitute evidence
21 against any defendant but is merely a method of bringing
22 a charge against him. The indictment in this case contains
23 two counts, as you know. Each count contains a separate
24 crime, which I will describe to you later, and they, the
25 two crimes, must be considered separately.

Equally if not more important is the observation that the indictment names seven defendants, actually eleven defendants, but seven are on trial. They are the persons whose guilt or innocence you must announce in your verdict. In the determination of innocence or guilt you must bear in mind that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him, solely on the evidence presented against him or the lack of evidence. The case of each defendant stands or falls upon the proof or lack of proof of the charge against that defendant and not against someone else.

Now, I have said, and the lawyers have said many, many times throughout the case, that the government has assumed the burden of proving each defendant guilty beyond a reasonable doubt. Let me define that important term for you at the outset.

A reasonable doubt is not a vague, speculative or imaginative doubt. It is a doubt which, as the phrase suggests, is based upon reason and which comes either from the evidence that has been put before you, that you've heard and seen, or from the lack of evidence, that you have not heard or seen. It is a doubt which a reasonable man or a woman might entertain. It is a doubt, and I think this is

the best definition, which would cause reasonable men and prudent men and women like yourselves to hesitate to act in relation to matters of importance in your own private lives.

Let us say that you have an important decision to make. How do you go about making that decision? You think about everything you know about it. You think about everything that you would want to know and you haven't been told. And you say to yourself, "Do I have enough information? Do I have enough dependable information so that I'm ready to act?" If you say I don't, then you have a reasonable doubt. If you say I do, then you do not.

A mere suspicion would not justify a conviction. Suspicion is not a substitute for evidence. Nor is it sufficient to convict if you find that the circumstances merely render the guilt of an accused to be probable. The law does not deal in probabilities. Since the burden, or responsibility, is on the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely on the failure of the prosecution to establish such proof and the defendant may also, of course, as in this case, rely upon evidence brought out on cross-examination or government witnesses.

Now, in saying that the government must prove its case beyond a reasonable doubt if there is to be a conviction, I do not mean to say that the government is required to prove guilt beyond all possible doubt. Indeed, in human affairs it is hard to think of anything that we can prove beyond all possible doubt with the possible exception of mathematical propositions. But the proof must be of such a convincing character that you would be willing to rely and act on in the most important decisions of your own affairs.

Now, the evidence in this case, as I've told you a number of times, consists of the testimony of the witnesses, the exhibits which have been received in evidence and facts which have been stipulated or agreed to by counsel. You have to decide the case based solely on the evidence. But in your consideration of the evidence you are not limited to the bald statements of the witnesses here or any witnesses in any trial. By using the word "bald" I don't mean to suggest anything about the character of the testimony, but I mean you are entitled to and must think behind the mere words that were uttered.

In deciding the many questions before you, it is your job to determine the credibility of the witnesses who have testified here. Now, how do you go about that? Perhaps the best answer is to say that you determine the

truthfulness or accuracy or weight to be given to a witness' testimony in the same way that you would determine such questions in your own personal affairs.

We are all constantly called upon from day to day to determine how much confidence we place in the statements that people make to us. The truthfulness or dependability of a witness, as that of any other person, can be determined by his demeanor, that is, his look, his relationship to the case and to the parties, the possibility of his being biased or partial or of his not being biased or partial, the stake that he may have in the outcome of the case, the reasonableness or unreasonableness of his statements, the strength or weakness of his recollection, and the extent to which what he has said has been either corroborated or contradicted by testimony or other witnesses or by exhibits or stipulations.

Of course, the testimony of a witness may also be impeached by his own prior inconsistent statements unless there is some explanation for the inconsistency. In ordinary life, when you need to determine the truthfulness of a person, you ask yourself, don't you, as you would here, how did he impress me? Did his version appear straightforward and candid, or did he seem to be trying to hide some of the facts? Did he have any motive to testify falsely or no

b4 2 motive of that kind?

3 The ultimate question for you to decide on in
4 passing on the credibility of a witness is did he tell the
5 truth before me. It is for jurors alone to determine the
6 weight to be given to the testimony of a witness, and
7 in making these suggestions which I have made I have given
8 you guidelines only and have not attempted to dictate or
9 suggest how you should apply those guidelines.

10 If you find that any witness has wilfully testified
11 falsely as to any material, which means significant, matter,
12 not some matter which you believe to be unimportant, you
13 may reject the entire testimony of that witness or you
14 may accept such portion of it as you believe and reject
15 the remainder.

16 Now a few rules that apply particularly to this
17 case. In judging the credibility of any witness, you may
18 consider whether his testimony was inspired by a motive
19 or self-interest, personal advantage or hostility to
20 a defendant so that he gave false or colored testimony
21 against him, and whether the testimony of such a person
22 was a fabrication induced by a belief or a hope or an
23 expectation that he will receive favorable consideration,
24 such as not being indicted or charged with the offense
25 itself.

1 jgh15
2
3 As you know, the defendants contend that such
4 motives are true of some of the witnesses here. The govern-
5 ment has pointed out to you why they believe that that
6 should not interfere with your accepting the truth of the
7 witnesses' testimony.

8 In the prosecution of crime the government is
9 often called upon to use witnesses who are accomplices in
10 the commission of the crime itself. This is particularly
11 so in cases of conspiracy. Conspirators do not publicly
12 proclaim their intentions or operate openly. It often
13 happens that only members of the conspiracy have evidence
14 which is relevant to and important in the case.

15 However, experience has shown that accomplices
16 may be motivated to place the blame on others than them-
17 selves. Accordingly, an accomplice's testimony should be
18 carefully scrutinized and checked with the facts which you
19 find to exist in this case and against the evidence which
20 may corroborate it, and then you should give the testimony
21 of the accomplice such value or weight as you deem proper
22 under the circumstances.
23
24
25

By the way, in the federal courts, accomplice testimony by itself may be sufficient to convict if it convinces you of the defendant's guilt beyond a reasonable doubt.

Now, it is, of course, proper for you to consider the interest which a witness has in the outcome of the case. I do not mean to suggest, however, that a witness who has an interest in the outcome of the case may not be telling the truth in spite of his interest, merely to point out to you that you may consider that factor in determining what weight to give his testimony.

A witness' testimony is, of course, not to be given any greater or any less weight simply because the witness is a government witness.

Now, ladies and gentlemen, as I have said, your determination in this case must be made upon the evidence. There are generally speaking two types of evidence or two definitions, at least, or categories of evidence from which you may properly find the facts in the case. I am sure you have heard them referred to often. One is called direct evidence. That is the evidence of an eyewitness or an earwitness. "I have heard it," such a witness would say, "I have seen it." The other is indirect or more generally called circumstantial evidence. Circumstantial

evidence is defined as the proof of a chain of events or circumstances which itself points to the existence or non-existence of certain facts as to which there was no eye-witness.

The law makes no distinction as to the importance or weight of circumstantial or direct evidence just because it is either one or the other. It requires only that you, the jury, find the facts in accordance with all the evidence in the case, both direct and circumstantial, beyond a reasonable doubt.

An example, by the way, of the difference between direct and circumstantial evidence is the following, an example which is given often to juries in this court but which is nevertheless, I think, a pretty vivid one and, therefore, I will use it, too.

If you looked out the window, not today, because it is nice but on a different day, and see it is raining, that is direct evidence that it is raining.

On the other hand, if all the blinds were drawn in this room and somebody came through the door over there with a dripping umbrella, that would be pretty good circumstantial evidence that it was raining outside. You wouldn't have seen it with your own eyes, but you would have the right to infer, seeing a man coming through the door with

a dripping umbrella, that it was raining outside.

To be sure, he might have been standing in the shower in one of the rooms in this building that has a shower, but that is highly unlikely and the other inference is the likely one.

That, ladies and gentlemen, is an example given to you to help in making the inferences that you will have to make based upon the circumstantial evidence in this case.

Members of the jury, both the United States Attorney and defense counsel have from time to time throughout the course of this trial, although comparatively rarely, I must say considering the length of the trial and the strain that sometimes existed, objected in this case to the introduction of evidence and addressed arguments to the bench.

It is the duty of attorneys on each side of the case to make such objections when the attorney believes that the other side is proposing to put into evidence or ask questions about something that is not properly admissible. I want you to know that when I have sustained an objection to a question or when I have overruled an objection to a question, that doesn't indicate in any way any attitude of mine toward the merits or outcome of this case or how

1 you should decide it. What it means, and the only thing
2 it means, is that when I have sustained an objection, you
3 are to disregard the question and draw no inference from
4 the wording of the question as to what a witness might
5 have answered had I allowed him to do so.
6

7 Now, ladies and gentlemen, that I have instructed
8 you as to the manner in which you should consider the
9 evidence and since you have heard a very, very long summary
10 of the respective contentions of defense counsel and the
11 government, I will turn to the substance of the charges
12 against the defendants here.

13 The indictment, as you know, contains two counts.
14 Each count is a separate crime and each of them must be
15 considered separately by the jury as to each defendant
16 who is named in that count.

17 This is as good a time as any for me to tell you
18 that to assist you when you do make your decision one way
19 or the other, I have prepared what is known as a verdict
20 list so that when you have reached a conclusion your foreman
21 can simply fill in a blank of not guilty or guilty as to
22 the charge of the defendant and you will have recorded your
23 verdict. I believe it will help you out. Of course, I
24 will show it to defense counsel before it is delivered
25 to the jury.

The indictment names 11 defendants in all. The defendants Adams, Coviello, Mecca and Palmer are not, for reasons which are not of concern to the jury, on trial at this time. The only persons on trial before you now, of course, are the seven with whom you have become acquainted, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of others, that is, of the co-conspirators or of the co-defendants.

In the determination of innocence or guilt on all the charges, you must bear in mind, as I may have said before because it is so important, that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him solely on the evidence presented against him or the lack of evidence against him. The case of the defendants stands or falls on the proof or lack of proof of the charges against that particular defendant and not somebody else.

Of course, as you know, the guilt or innocence of a defendant must be determined beyond a reasonable doubt solely on the evidence against him.

Now, having got that important proposition out of the way, let me come specifically to the charges.

The charges in this indictment relate to violation

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2 of the United States Code, Sections 812, 841 and 846 of
3 Title 21.

4 Title 21, Section 841, provides in pertinent
5 part -- I am reading from the law passed by Congress --
6 "It shall be unlawful for any person knowingly or intention-
7 ally to distribute or possess with intent to distribute
8 a controlled substance."

9 Section 846 makes it a crime to conspire or
10 agree to commit such crimes, including the crime which I
11 just read to you.

12 Section 812 defines controlled substances to
13 include marijuana.

14 Count 1 charges that from August 1, 1971, and
15 continuing up to and including December 7, 1973, the earliest
16 date of the filing of these charges by the grand jury,
17 the defendants -- and I won't read you their names because
18 you know them -- unlawfully, intentionally and knowingly
19 conspired and agreed together to distribute and to possess
20 with the intent to distribute a controlled substance, that
21 is, marijuana.

22 The indictment further charges that as part of
23 the conspiracy the defendants wilfully and knowingly would
24 import marijuana into the United States.

25 Further, the first count of the indictment charges

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2 that the defendants did certain acts called overt or open
3 acts in furtherance of that conspiratorial agreement.

4 Count 2 charges that in May, 1972, the defendants
5 possessed with intent to distribute a controlled substance,
6 that is, approximately 500 pounds of marijuana and, as
7 you know, from all the summations, the possession of that
8 amount of marijuana is alleged to have occurred at the Rye
9 Hilton Hotel in Rye, New York, or the Rye Town Hilton, what-
10 ever it is, on the date in question.

11 Now let us turn to the first charge, which for
12 ease of discussion I will call the conspiracy charge.
13 Before you may convict any defendant under the conspiracy
14 charge you must find that the government has proven beyond
15 a reasonable doubt all of the following elements:

16 First, you must find the existence of the con-
17 spiracy charge. Obviously nobody can be guilty of belonging
18 to a conspiracy unless there was a conspiracy as charged in
19 the indictment.

20 Secondly, you must find that the defendant whose
21 guilt or innocence you are considering at that time knowingly
22 and wilfully associated himself with the conspiracy or
23 joined it.

24 Third, you must find that at least one of the
25 conspirators committed at least one of the so-called overt

acts mentioned in the indictment, and which I will tell you more about shortly.

If the government fails to establish any or all, whichever way you look at it, of those essential elements beyond a reasonable doubt, then you must acquit the particular defendant whose case you are considering on that point. If it succeeds in proving all those things as to that defendant, then, of course, it is your duty to convict that defendant on count 1.

Now, the gist of the crime of conspiracy is the unlawful agreement to violate the law.

Ladies and gentlemen, I get worried sometimes about the instructions which we judges give -- I am departing from my charge, by the way, in telling you this -- the instructions which we give you about conspiracy because I think sometimes we instruct you to a fare-thee-well and I hope I won't overdo that today. There are a lot of things that it is important for you to know. But above all I think you need to have as your mooring for all of the discussion about conspiracy that a conspiracy is nothing more nor less than an agreement of two or more people, of course an intentional and knowing agreement, to violate the law. And if you bear that in mind, I think all of the other aspects of the instruction will be much clearer to you.

Whether or not the defendant accomplished what it is alleged he and the others conspired to do is immaterial to the question of his guilt or innocence if a conspiracy does not come to fruition. A conspiracy need not come to fruition, need not be successful in order to constitute an illegal act or crime. It is the very conspiracy itself, together with at least the commission of at least one overt act, that creates the crime.

A conspiracy has often been called a partnership in criminal purposes in which each member, once you are satisfied that somebody became a member, becomes the agent of each other member.

I want to comment on that point there.

You may remember that early in the trial I explained to you that it was not possible always to put evidence in in a particular order that might be ideal and that some evidence might be put in as to a statement with regard to defendant X or by defendant X which might apply to defendant Y, but that it could only be applied to defendant Y if you found that defendant Y was, indeed, a member of the conspiracy. I want to remind you of that instruction again and I will shortly give you an instruction as to how you determine whether a defendant should be adjudged to have been a member of the conspiracy or not.

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2 But coming back now to the nature of a conspiracy
3 itself, to establish the existence of a conspiracy the
4 government is not required to show that two or more persons
5 sat around the table and entered into a solemn compact orally
6 or in writing stating that they formed a conspiracy to
7 violate the law and setting forth the details of their
8 plans. It would be pretty darn extraordinary if there
9 was such a formal document or specific oral agreement.

10 Your common sense will tell you that when a man
11 undertakes to enter into a criminal conspiracy which, by
12 definition, means an agreement to violate the law, he is
13 not going to announce it from the housetops and much is
14 left to the understanding.

15 Conspirators do not usually reduce their agree-
16 ments to writing or swear to them before a notary public.

17 It is sufficient if the government establishes
18 to your satisfaction beyond a reasonable doubt that two or
19 more persons, that would mean, of course, two or more persons
20 are the defendant or co-conspirators named in this indict-
21 ment, in any manner through any contrivance impliedly or
22 tacitly or explicitly came to a common understanding to
23 violate the law. Express language or specific words are
24 not required to indicate assent or attachment to a con-
25 spiracy, nor is it required that you find that all of the

conspirators alleged in the indictment joined in the conspiracy in order to find that the conspiracy existed, but obviously you must find that at least two people did or you can't have a conspiracy.

In determining whether there has been an unlawful agreement, you may judge the acts and conduct of the alleged conspirators which are done to carry out an apparent criminal purpose. The maxim that action speaks louder than words is applicable here, as it often is in human conduct.

Often the only evidence available is that of disconnected acts which, however, when taken together and in connection with each other may show a conspiracy to secure a particular result as satisfactorily and as conclusively as more direct proof.

The offense is complete when the unlawful agreement is made and after any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators.

Proof concerning the accomplishment of the conspiracy may be the most persuasive evidence of the existence of the conspiracy. So if you believe that the venture alleged here existed and was successful, the success itself may be the best proof of the existence of the agreement.

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2 In determining whether the conspiracy charged
3 here did actually exist, you may consider the evidence of
4 the acts and conduct of the alleged conspirators as a
5 whole and the reasonable inferences to be drawn from such
6 evidence. If upon consideration of the evidence you find
7 beyond a reasonable doubt that the minds of at least two
8 of the alleged co-conspirators met in an understanding way
9 and that they agreed as I have explained to work together
10 in furtherance of the alleged unlawful scheme, then proof
11 of the existence of the conspiracy is complete. That is the
12 first element.

13 Now, as you know -- and I am still talking about
14 the first element, that is the conspiracy itself -- as
15 I have said, the indictment charges and the government
16 contends that the evidence adduced during the trial reveals
17 a single conspiracy.

18 If you find that the evidence establishes that
19 a number of steps and transactions were required in order
20 to accomplish the goals of the conspiracy charged in the
21 indictment and that all of the activities involved in these--
22 transactions were coordinated nevertheless by a central
23 aim or purpose and that there was a nucleus of persons who
24 had a basic community of purpose throughout all the trans-
25 actions, then that would amount to a single overall

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2 conspiracy. This would be so even though there may have
3 been a division of labor in fulfilling the objects of the
4 conspiracy.

5 On the other hand, if you find that the evidence
6 does not show one overall conspiracy but, instead, shows
7 the existence of a number of separate and independent
8 conspiracies, each with its own aims and objectives and
9 each with his own separate nucleus or corps of conspirators,
10 then you would have multiple conspiracies and the government
11 would have failed to establish the single overall conspiracy
12 as charged and in that event you would have to acquit
13 the defendants on the charge of conspiracy.

b3 14 Moreover, even if you find that the government
15 has proven a single overall conspiracy, you must then
16 determine -- and this is the second element -- whether
17 any particular defendant has become a member of it knowingly
18 and wilfully in order to find that defendant guilty.

19 Let us talk about this second element, that is,
20 membership in the conspiracy, individual membership in
21 the conspiracy.

22 You cannot find Mr. X guilty of count 1 unless
23 you find that Mr. X knowingly joined the conspiracy.

24 Let me be more specific for you. If you conclude
25 that the conspiracy charged in this indictment existed, you

1 must next determine whether the defendant whose guilt
2 you are considering or, rather, whose case you are con-
3 sidering was a member or became a member, whether he
4 participated in the conspiracy with knowledge of its un-
5 lawful purpose and in furtherance of its unlawful ob-
6 jectives.
7

8 To find a defendant's membership in a conspiracy
9 you must find that he knowingly and intentionally parti-
10 cipated in it. Thus, mere knowledge by a defendant of
11 the existence of a conspiracy or of any illegal act on the
12 part of another alleged co-conspirator or mere association
13 with one or more of the co-conspirators is not sufficient
14 in itself to establish membership. The government must
15 establish beyond a reasonable doubt that the defendant
16 under question was aware of the basic purposes and objects
17 of the conspiracy, that he entered into it with a specific
18 criminal intent and that was with the purpose to violate
19 the law.

20 So if a defendant with an understanding of the
21 unlawful character of the conspiracy intentionally engages,
22 advises or assists for the purposes of furthering it,
23 then he becomes a knowing and wilful participant or con-
24 spirator.
25

Whether or not a defendant was a member of the

conspiracy or joined the conspiracy must be determined--
I believe I may have said this before but I will stress
it again -- on the evidence as to his own actions, his own
conduct, his own statements and declarations, his own con-
nection with the acts and conduct of the other alleged
co-conspirators.

The guilt of a co-conspirator, if you find that
there was a conspiracy and he joined it, is not governed
by the extent or duration of his participation in the
conspiracy or whether he had knowledge of all of its
operations. Even if one joined the conspiracy after it
was formed and was engaged in it to a degree more limited
than that of some other co-conspirator, he may still be
found guilty of conspiracy.

Each member of the conspiracy may perform, and
usually does, separate and distinct acts at different
times in different places. Some conspirators obviously
play more important roles than others. But it is not
required for the proof of the elements we have been talking
about that a person be a member of the conspiracy from
its very start or that he do everything that was done
within the conspiracy. He may join it at any point
during its progress and he would then be held responsible
for all that has been done before he joined and all that

would be done by the conspirators in pursuance of the conspiracy thereafter during its existence and while he remains a member.

Simply stated, again using the partnership analogy, a partner assumes the liabilities of the partnership, including those that occurred before he became a member. Thus, if you find that a given defendant is a conspirator, that is, became a member of it knowingly, then however limited his role in furthering the objectives of the conspiracy, he is responsible for all that was done in furtherance thereof before or during the conspiracy while he is a member.

Now we come to the last element with regard to the conspiracy, that is, the question of overt acts.

Assuming that you have found that the conspiracy charged existed and that a defendant whom you are considering was a member of that conspiracy or became a member of it knowingly, then the question arises whether any of the co-conspirators committed at least one of the overt acts charged in the indictment in furtherance of the conspiracy.

The purpose of requiring proof of an overt act is not inconsequential. It is that while parties may conspire and agree to violate the law, they could and they

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2 do change their minds and do nothing to carry out that
3 plan. In that case no crime would be committed.

4 You and I can sit here and even plan to blow
5 up the capital of the United States and talk about it for
6 days on end, but if we never do anything about it, that
7 is not a crime. The moment, however, that one of the co-
8 conspirators does something in furtherance of the crime,
9 then the crime is complete.

10 Now, it is true that overt acts as listed in
11 the indictment generally speaking are not necessarily
12 criminal in themselves. That does not mean, however, of
13 course, that an action taken may not be sufficiently
14 weighty to be in furtherance of the crime.

15 If I phone you in connection with our plan to
16 blow up the capital of the United States and suggest that
17 we meet at a certain time and place, while it may be
18 perfectly normal and not criminal to telephone people,
19 that would be an act in furtherance of the conspiracy.

20 An overt act need not be a criminal act nor
21 the very crime which is the subject of the conspiracy.
22 The government is not required to prove that each member
23 of the conspiracy committed or participated in any particular
24 overt act since the act of any one conspirator done in
25 furtherance of the conspiracy becomes the act of all the

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2 other members.

3 Moreover, the government is not required to
4 prove each of the overt acts that are alleged in the in-
5 dictment, it is sufficient if it proves the commission of
6 at least one of the acts by one of the co-conspirators in
7 the Southern District of New York, which includes Rye, New
8 York.

9 The overt acts here I will read to you so that
10 you will be acquainted with them in case you have any
11 difficulty in interpreting the indictment when you have it
12 in your possession.

13 I am deliberately omitting overt act 1, which
14 I have stricken from the indictment.

15 2. In or about February, 1973, the defendants
16 James Adams, Dominic Mecca and Richard Belanger met and
17 had a conversation in Florida.

18 3. In or about February, 1973, the defendant
19 James Adams paid the defendant Robert Wilner approximately
20 \$12,000.

21 4. In or about February, 1973, defendant Robert
22 Wilner as agent for Air Seas Charter Services, Inc., purchased
23 a 24-foot Floton Seacraft boat in Fort Lauderdale, Florida.

24 5. On or about March 6, 1973, defendant Steven
25 Smith and co-conspirator Richard Thurlow boarded a boat in

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Miami, Florida.

6. On or about March 7, 1973, defendant Steven Smith and co-conspirator Richard Thurlow possessed approximately 700 pounds of marijuana on Williams Island, Bahama Islands.

7. On or about May 13, 1973, defendants Robert Wilner and John Doe, also known as Anthony, boarded an airplane at John F. Kennedy International Airport in the City of New York and flew to Fort Lauderdale, Florida.

8. In or about May, 1973, defendant John Doe, also known as Anthony, and co-conspirator Gerald Mitchell drove from Fort Lauderdale, Florida, to the Rye Town Hilton Hotel in Port Chester, Westchester County, New York.

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Ladies and gentlemen, I said before that Rye was in the Southern District of New York as it is, but I now see that the Rye Town Hilton is in Port Chester, New York, and I instruct you that Port Chester is also in the Southern District of New York.

Again, in or about May, 1973, defendants Robert Wilner, Dominic Mecca and John Doe, also known as Anthony, and co-conspirator Gerald Mitchell met at the Rye Town Hilton Hotel in Port Chester, Westchester County, New York and had a conversation.

10. In or about June, 1973, defendants Robert Vissa and Nicholas Calabro and co-conspirator Gerald Mitchell drove from the State of Maine to Stamford, Connecticut where they met and had a conversation with defendants John Doe, also known as Anthony, and Robert Wilner.

11. On or about June 10, 1973, the defendants John Doe, also known as Anthony, and Gary Stephan boarded a boat in Fort Lauderdale, Florida.

12. On or about June 11, 1973, defendant Robert Wilner and co-conspirator Gerald Mitchell landed an airplane on Long Island in the Bahama Islands.

13. On or about June 11, 1973, defendants Richard Palmer and Robert Vissa landed an airplane on Long Island

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2 in the Bahama Islands.

3 14. In or about June, 1973, defendants Paul
4 Stephan, Dominic Mecca, Nicholas Calabro, Robert Wilner,
5 Robert Vissa and Richard Palmer and co-conspirator Gerald
6 Mitchell met at Pier 66 hotel, Fort Lauderdale, Florida,
7 and had a conversation.

8 15. In or about June, 1973, defendants Gary
9 Stephan and John Doe, also known as Anthony, returned to
10 Fort Lauderdale, Florida, by boat.

11 16. In or about June, 1973, co-conspirator
12 Gerald Mitchell possessed approximately 260 pounds of
13 marijuana.

14 Ladies and gentlemen, I have completed the
15 definition of the elements of conspiracy which is the
16 charge contained in count 1. I do want to say this:

17 While the indictment charges that the conspiracy
18 existed from on or about the 1st day of August, 1971,
19 and continuously thereafter up to and including December,
20 1973, which is the date of the filing of the indictment,
21 it is not essential as a matter of law that the government
22 prove that the conspiracy started and ended precisely on
23 those dates, it is sufficient if you find that, in fact,
24 a conspiracy was formed and existed for some time within
25 the period set forth in the indictment and that at least

one of the overt acts was committed in furtherance of the conspiracy during that period.

A conspiracy, once formed, is presumed to have continued until its object is accomplished or until there is an affirmative act of termination by its members or it is otherwise clearly terminated, as, for example, by arrest of the defendant.

So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until the termination of the conspiracy, unless there is affirmative proof of his withdrawal or his disassociation from it.

Now, ladies and gentlemen, I have finished instructing you with regard to conspiracy. We come now to the law with regard to count 2.

The second count of the indictment, that is, the substantive count, as we call it, charges the defendants with the unlawful possession with intent to distribute 500 pounds of marijuana.

Before you can find any defendant guilty on count 2, you must be convinced beyond a reasonable doubt that the government has proven all of the following elements of the crime.

First, that on or about the date alleged, which

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2 is May, 1973, the defendant under consideration possessed
3 with the intent to distribute the marijuana specified
4 in the count.

5 Second, that the substance possessed with intent
6 to distribute was marijuana.

7 And third, that the defendant under consideration
8 did what he did unlawfully, wilfully and knowingly.

9 You will note that the first element of the
10 offense is to possess with ~~intent~~ to distribute. What does
11 that phrase mean? Well, the word distribute means, as you
12 would expect it to, to transfer or deliver other than by
13 administering or dispensing a controlled substance. In
14 other words, there are legitimate ways to dispense controlled
15 substances and we are not talking about those.

16 It is not necessary that the government prove
17 that the defendant actually controlled the substance, but
18 only that he possessed it with the intent to distribute it
19 on or about the date charged.

20 Ladies and gentlemen, that instruction is not
21 accurate and I ask you to strike that.

22 It is necessary to show that he possessed it
23 with the intention to distribute it, and I will talk about
24 control of the marijuana in a moment.

25 The law recognizes two kinds of possession and

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2 I think probably we do in our daily lives, too, although
3 we are not so conscious of it.

4 First is actual possession. I have this
5 piece of paper in my hand. I actually possess it. A person
6 who knowingly has direct physical control over a thing
7 at a given time is then in actual possession of it. But
8 a person who, although not in actual possession, has the
9 power, the power at a given time to exercise dominion or
10 control over a thing, is then in what the law calls con-
11 structive possession of it.

12 The law recognizes, also, that possession may be
13 sole or joint, that is, a thing may be possessed by one
14 person or by more than one person. If one person alone
15 has actual or constructive possession of the thing, possession
16 is sole. If more than one person does, then it is joint.

17 If you find from the evidence beyond a reasonable
18 doubt that any of the accused either alone or jointly with
19 others had actual or constructive possession of the substance
20 as described in count 2, then you may find that that substance
21 was in the possession of the accused within the meaning
22 of the statute.

23 The word intent, that is, with intent to distribute,
24 refers to a person's state of mind, of course, so the term
25 to possess within intent to distribute can be fairly stated

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2 to mean to possess or control an item with the state of
3 mind or purpose of transferring or deliverng that item.

4 That is the first element of count 2.

5 The second element you must find beyond a
6 reasonable doubt with regard to count 2 is that the substance
7 referred to in count 2 was, indeed, marijuana. I instruct
8 you as a matter of law that marijuana is a controlled sub-
9 stance, but you must find that the substance which is re-
10 ferred to in count 2 was marijuana and you must make such
11 a finding, of course, as you do all your other findings,
12 beyond a reasonable doubt. I will say more about that
13 hereafter.

14 The third element which you must find as to count
15 2 if you are to convict any defendant is that the possession
16 of the marijuana occurred wilfully, knowingly and intention-
17 ally. These words mean that you must be satisfied beyond
18 a reasonable doubt that the defendant whose guilt you are
19 considering knew what he was doing and he did it deliberately
20 and voluntarily as opposed to mistaken or accidentally
b5 21 or under a mistaken assumption.

22 Now, knowledge and intent exist in the mind. It
23 is not possible to look into a person's mind physically to
24 see what goes on there. The only way you have for arriving
25 at a decision on such questions is to take into consideration,

as you do all the time in your daily lives, the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were proven to you beyond a reasonable doubt.

D' ect proof of knowledge is unnecessary. Of course, if there were such proof it would be the best there could be, but the only way you could get direct proof of a person's intention is for him to have said or somebody else to have testified that he said, "I meant to do that." That rarely occurs. But knowledge and intent may be inferred from all the surrounding circumstances.

Now, there are two other alternate bases beyond those that I have described to you on which findings of guilt may be found as to count 2, but it still requires proof of the high degree which I have previously mentioned, that is, beyond a reasonable doubt.

Any person who commits an act in violation of a criminal statute, of course, commits a crime. But it is also a crime not only to commit an illegal act, but to aid or abet another person to commit that crime. The second crime, if you want to call it a crime, or the second basis to be held liable for a crime is the legal principle that anyone who aids and abets another one to commit an illegal

act is also guilty of committing that act.

Accordingly, if you should find beyond a reasonable doubt that any of the defendants named in count 2 or any of their co-conspirators committed the crime charged in count 2 and that another defendant aided or abetted that defendant, you would have a sufficient basis for finding the guilt of the second person as to count 2.

Now, what does aid and abet mean? To find that a defendant aided or abetted another to commit a crime, you must find that the allegedly aiding and abetting defendant in some positive, clear way associated himself with the criminal venture, that he participated in it not just casually but as something he clearly wished to bring about. In other words, you must find that he sought by his actions to make the venture succeed.

Thus, in order to find the defendant guilty of aiding and abetting, you must of course find something much more than mere knowledge on his part that a crime was being committed. For a mere spectator at a crime is not a participant, however unfortunate his conduct may be. If you stood watching somebody else hold up a man with a gun, you would not be, by that alone, aiding and abetting that man. In order to convict, it is not necessary, however, that you find that the defendant himself did the acts.

1
2 There is, finally, another alternative basis
3 upon which you may find a defendant named in count 2
4 guilty. This alternative basis is as follows: If you
5 find beyond a reasonable doubt that the offense charged
6 in count 2 was committed by one of the defendants who was
7 a member of the conspiracy, and that another defendant
8 was then a member of the conspiracy and that the acts
9 which constituted the offense in count 2 were done in
10 furtherance of the conspiracy of which B was a member,
11 B being the second defendant, and that the second defendant
12 might reasonably have foreseen that those very acts would
13 be done by the first defendant, then you may find that the
14 second defendant is guilty of the offense alleged in count
15 2 even though he didn't personally participate.

16 Let me be more specific. If you and I agree
17 to commit an illegal act, and if you go ahead and actually
18 commit that act, and if that act was in furtherance of
19 our conspiracy and I could reasonably tell that as part
20 of this conspiracy you would commit that act, then even
21 if I didn't help you, I may be found guilty of having
22 committed that act.

23 Now, ladies and gentlemen, as you know, there
24 has been evidence in this case, at least on one occasion,
25 when Richard Palmer met with Robert Wilner and another

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2 occasion, when Palmer met with Robert Wilner, Mecca and
3 Belanger, that he was equipped with recording devices,
4 and you've heard tapes resulting from that.

5 I am instructing you as a matter of law, and
6 I think I took this up with you at the beginning of the
7 trial, before you were chosen as jurors, that the use of
8 such devices in the manner described in this case is entirely
9 within the law and does not violate anyone's rights. This
10 is because Richard Palmer, who was a participant in the
11 conversations, consented to have them recorded. Accordingly,
12 whatever your private views may be as to the desirability
13 or undesirability of the law's policy on that subject,
14 you must be governed by the law, which is that there is
15 nothing illegal about such recording.

16 One or two more items to bring to your attention.
17 I told you earlier that you must under count 2 determine
18 to your satisfaction beyond a reasonable doubt that the
19 substance possessed at the Rye Hilton Hotel in May, 1973,
20 was marijuana. I instruct you, as I told you before, that
21 marijuana is a controlled substance.

22 Now, just as with any other component of a crime,
23 the existence of and dealing with marijuana may be proven
24 by circumstantial evidence. There need be no sample placed
25 before the jury, nor need there be testimony, although

1 Jgh4

2 there was some, by chemists, as long as the evidence
3 furnishes a base for inferring that the material in
4 question was marijuana. The evidence is before you and
5 you have to determine whether you are satisfied beyond
6 a reasonable doubt on that point.

7 Ladies and gentlemen, in every criminal case
8 there is a fundamental rule which every defendant has the
9 right to rely on. That is the rule that no defendant may
10 be compelled to take the witness stand or offer any testimony
11 whatsoever. Pleading not guilty, a defendant has in effect
12 denied the charges on which he is being tried and denied
13 every material issue against him stated in the indictment.
14 It is the prosecution which must prove him guilty, and
15 he cannot be required to testify or to disprove anything.

16 Any accused person has the right to stand mute.
17 The fact that he does not take the stand, as the defendants
18 in this case have not, may not be considered by you as any
19 indication of guilt or as an admission of guilt or as
20 evidence or an inference of guilt.

21 Now, that's not just an artificial rule. If
22 you were accused of a crime, you would feel that there was
23 no reason for you to prove your innocence. However thoroughly
24 you might be convinced of that innocence or knew of it,
25 you would understand that it was the government's job to

1 jgh5

2 prove you guilty if it could, not as a contest but if
b2 3 that's what the facts are.

4 Ladies and gentlemen, I've come near the end
5 of my formal instructions, but in a sense the most im-
6 portant part of the case is the part which you now are to
7 play as jurors, because it is for you and you alone to
8 decide whether any of the defendants are guilty on either
9 of the counts charged.

10 I know that you'll try the issues that have been
11 presented to you in accordance with the serious oath that
12 you took as jurors, in which you promised that you would
13 well and truly try the issues joined in this case and,
14 as you probably remember from my repeating it time after
15 time when I was impaneling this jury, based solely on the
16 evidence which you have had put before you in this courtroom
17 and the instructions as to the law which I am now concluding
18 in giving you.

19 I like that phrase "well and truly try the
20 issues joined in this case" - it goes back a thousand years,
21 and it's old fashioned flavor should mean something to you
22 and remind you of the hundreds of thousands of juries who
23 have performed this function before you - and that "you
24 must a true verdict render based upon the evidence you
25 heard in this court and the exhibits."

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2 In order for you to reach a verdict of either
3 not guilty or guilty as to any defendant on either count,
4 your verdict must of course be unanimous. That is, every-
5 body must agree as to that particular verdict.

6 Now, in spite of that requirement of unanimity,
7 each of you must decide each count as to each defendant
8 individually in accordance with your own consciences, but
9 only after deliberation with your fellow jurors to determine
10 whether you believe a just verdict is being reached. You
11 shouldn't hesitate to change your mind if you become
12 convinced that your original view of the case was not in
13 accordance with the facts and the law. On the other hand,
14 you should not change your minds just for the purpose of
15 reaching a verdict as a matter of convenience.

16 I haven't any reason to believe that this jury
17 won't be able to reach a unanimous verdict one way or the
18 other as to the matters put before it.

19 To sum up, if you find there is a reasonable
20 doubt that the law has been violated, you should not hesitate
21 for any reason to find a verdict of acquittal. But on the
22 other hand, if you find that the law has been violated
23 as charged, you should not hesitate because of sympathy
24 or any other reason to render a verdict of guilty.

25 Nothing that I have said in these instructions,

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2 and I stress this, whatever it may be, is intended to
3 indicate any view of mine towards how the various issues
4 put before you should be decided.

5 Now, ladies and gentlemen, according to custom,
6 juror number 1 normally acts as the foreman of the jury.
7 Our friend juror number 1 here has expressed to me the
8 wish that he should not serve, and I am honoring his wish.
9 I have spoken to Mrs. Taxman, who is juror number 2, and
10 told her that for the purposes of objectivity and not
11 trying to choose or pick among you I would like to see that
12 she serves as forelady, and she has kindly agreed that she
13 would. That doesn't mean that she has any authority that
14 the rest of you do not have but just that she will assist
15 in seeing to it that your deliberations are orderly and
16 that all communications to the court are properly made.

17 Mrs. Taxman, I understand that you have once before
18 served as a forelady and I'm glad to know that. You will
19 remember that you have the right at any time, and I am
20 telling this to all of you ladies and gentlemen, to ask
21 for the exhibits or any one of them. You have the right
22 to have any of the testimony read to you or any of the
23 tape exhibits played for you. You have the right to put
24 any questions that you want to the court.

25 If you do wish to have any testimony read back to

1 Jgh8

2 you or any other exhibit, it would be helpful if you could
3 be as specific as possible about the material that you
4 are interested in so that we can be assisted in locating
5 that material. And, of course, the way that you will get
6 in touch with us will be to give a note to the marshal,
7 who will be standing outside the door of your jury room.
8 I am neither encouraging nor discouraging your asking
9 for things but certainly want you to have whatever you want.

10 It is not my practice, ladies and gentlemen, to
11 send in all of the exhibits, plunk them down on the jury
12 room table and leave them there. However, if you would
13 prefer, when you start your deliberations, to have all
14 of the exhibits before you, all you have to do is to write
15 a note saying you want all the exhibits. And if, on the
16 other hand, you just want some of the exhibits, you can
17 ask for them.

18 I will also say, because sometimes a jury asks
19 that the judge's charge be sent in to them, that I will
20 not send my charge in to you. I hope it has been clear.
21 But if it has not been clear, then I am afraid it would
22 be less clear if I sent it in to you and you all tried
23 by yourselves to figure out what it meant. If you have
24 any questions as to what my charge is, simply write me a
25 note saying you have a question and come on out and tell

1 me what your question is or specify the question in your
2 notes. Counsel and I will sit down and talk about it
3 and, I believe, will agree on what the answer is. Fortunately
4 for me, if we don't agree, then I will tell you what the
5 law is.
6

7 Ladies and gentlemen, I have now come to the
8 end of my instructions. I want to confer with counsel
9 in the robing room and see whether they feel that anything
10 I have said requires clarification. It won't take us
11 very long. Please remain in the jury box and we will be
12 right back.
b3

13 (In the robing room.)

14 MR. SHAW: Your Honor, before we take up the
15 charge, I would just like to list an objection to the
16 summation, and that was the comment from the prosecutor,
17 "heard from Smith." I would point out that --

18 THE COURT: I've pointed out that the prosecutor
19 immediately indicated that that was incorrect, and whatever
20 motion you are making with regard to that is denied as
21 in my belief not prejudicial. But I understand the reason
22 for your making the motion.

23 MR. THAU: Since Mr. Shaw referred to summations,
24 I will also. You will remember that there came a point--
25

THE COURT: Gentlemen, I am sorry to interrupt,

1 but we have the jury sitting out there. Let's get the
2 charge out of the way first. Any of these loose ends can
3 be taken care of later.
4

5 MR. LA ROSSA: I have an exception to the charge,
6 if you like.

7 THE COURT: Yes, I assume people will.

8 Go ahead, Mr. La Rossa.

9 MR. LA ROSSA: I respectfully except to that
10 portion of the charge wherein you directed the jury that
11 they may not consider the August, 1971, incident and,
12 I think you said, the August, 1973, incident. Am I right?
13 I respectfully submit that that vitiates the Kotteakos
14 argument, and for that reason I except.

15 THE COURT: Yes. I believe you made the argument
16 at an earlier time.

17 Anybody who is affected by that it is understood
18 has such an exception.

19 MR. LA ROSSA: I have no other exceptions to the
20 charge.

21 MR. ABRAMOWITZ: I have an exception. When
22 you mentioned the tapes, you only mentioned the Palmer-
23 Wilner and the Palmer-Belanger tape as being legal tapes.
24 I would appreciate it if your Honor would tell the jury
25 that the Mecca-Vissa-Mitchell tape is perfectly legal since

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2 it had the consent of at least Mecca.

3 THE COURT: All right. You are entirely correct
4 in requesting that. All right.

5 Next?

6 MR. HOFFMAN: I would request of the court that
7 your Honor instruct the jury that any defendant who may have
8 in fact done an overt act as charged, that the mere doing
9 of such act if it was not in and of itself a crime is
10 not in fact any evidence that the participated in the
11 conspiracy. I think they may have gotten the impression
12 that if any defendant did an overt act then he was a member
13 of the conspiracy. He may have done it totally innocently.

14 THE COURT: Next?

15 MR. THAU: Your Honor, I am not trying to use
16 your exact words, but I think I probably have them. Your
17 Honor said that there was evidence that when Palmer met
18 with Wilner and Belanger and Mecca he was equipped with a
19 recording device.

20 The wording there, in my mind, presupposed that
21 it was a proven fact that there had been such a meeting
22 and that your Honor was only addressing himself to the fact
23 that wearing that kind of an apparatus was legal. Now,
24 we made much on the defense side, I think, I certainly did,
25 of the contention that there wasn't such a meeting. I think

1 it left with the jury that there was a meeting, that there
2 was a recording of these two defendants now on trial.

3 MR. LA ROSSA: I am afraid I forgot that, and
4 I agree. Can you just tell the jury that the existence
5 and reliability of all the tapes is a question of fact
6 for them to determine.

7 THE COURT: Well, yes. But will that correct what
8 you have in mind or do you want me to tell them that the
9 defendants contend there was no such meeting?

10 MR. THAU: That's right.

11 THE COURT: I'll be glad to tell them that. I
12 frankly don't think that they assumed because I said that
13 that the meeting occurred. But all right.

14 Next? Anybody else?

15 MR. LA ROSSA: You are including mine?

16 THE COURT: What is that?

17 MR. LA ROSSA: When you tell them about the tapes,
18 as Mr. Thau just asked, would you tell them that the existence
19 and reliability, if any, of the tapes is a question of fact
20 for them to determine.

21 MR. THAU: As well as whether that meeting was
22 ever held.

23 MR. ABRAMOWITZ: Your Honor, I just have one last
24 one.
25

1 jgh13

2 THE COURT: Yes.

3 MR. ABRAMOWITZ: That is, at the end of your charge
4 you said that it is your job to decide whether the law has
5 been violated. I think if your Honor would amend that
6 by any one of the defendants or all of the defendants,
7 it would be a little more accurate.

8 The law could have been violated by the three
9 government witnesses.

10 THE COURT: I am not going to do that. I've been
11 terribly specific about indicating personal guilt, I mean
12 the personal nature of guilt.

13 I think I've heard from all defendants. Have I
14 not?

15 Mr. Truebner?

16 MR. TRUEBNER: The government doesn't have anything
17 specific, your Honor, except, as to the question of tapes,
18 if the court is going to charge that the defendants Wilner
19 and Belanger contend that there was no such meeting --

20 THE COURT: Certainly. The government does.

21 MR. LA ROSSA: You are just going to say the
22 defendants contend?

23 THE COURT: I am going to say the defendants
24 contend there was no such meeting, the government contends
25 there was, it is for you to decide.

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2 MR. TRUEBNER: Will your Honor send a copy
3 of the indictment in? I just want to make clear that we
4 are working with an amended indictment in the sense that
5 even though a superseder was never filed counsel all agreed
6 that the indictment that was filed contained the words
7 "narcotic drug controlled substance."

8 THE COURT: I remember that. That was changed.

b4 9 MR. TRUEBNER: I have a clean copy here. We
10 can excise over that number 1 with a pair of scissors or
11 we can block it out or just cut out a little box there
12 if we have a pair of scissors. Maybe the clerk has one.

13 THE COURT: We can do that immediately after
14 they are going.

15 MR. LANNA: Can we come back in later after the
16 government's summation?

17 THE COURT: Yes.

18 (In open court.)

19 THE COURT: Two points here.

20 Both sides would like me to amplify what I
21 had to tell you about the tapes in various ways. The first
22 remark I want to make is that of course the existence of
23 the tapes, the reliability of the tapes is a matter of fact,
24 and being a matter of fact it is for you to decide how
25 reliable they are.

1
2 Second. I want to remind you that because I
3 mentioned certain conversations involving Mr. Wilner,
4 Mr. Belanger and Mr. Palmer did not mean to suggest that
5 the tapes played as to conversations between Mr. Mitchell
6 and Mr. Mecca and including Mr. Vissa are not also legal.
7 Of course they are, because Mr. Mecca consented to their
8 being taped in the same way that Palmer consented as to
9 the other tapes.

10 Finally, the fact that I gave you an instruction
11 about any of these tapes, and in particularly about the
12 tape of an alleged meeting at which Mr. Wilner, Mr. Belanger
13 and Mr. Palmer were present does not mean that I am saying
14 that that meeting is proven or disproven. I am not commenting
15 on whether the meeting occurred. I am just commenting on
16 the legality of the tapes.

17 Now, one of the counsel was somewhat concerned
18 that you might think, as a result of what I explained to
19 you about the nature of an overt act and the requirement
20 that it be proven that one of the co-conspirators committed
21 an overt act -- they were worried that you might think that
22 the commission of an overt act is in itself a crime.

23 I think I pointed out to you that you may commit
24 an overt act without committing a crime. And even in the
25 situation here, if you did not know that the overt act you

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2 were committing was in furtherance of the crime, you,
3 yourself, of course, would not be guilty. In other words,
4 the commission of an overt act must be knowing. The
5 person doing it must know that it is in furtherance of
6 the conspiracy, in order for it to be legally effective.

7 I think I have covered all of the points that
8 counsel asked me to take up with you at this time. Have
9 I not, gentlemen?

10 And I am therefore ready for you to commence
11 your duties, ladies and gentlemen, with one exception.

12 Does anybody want to look at this list before
13 I hand it over to Mrs. Taxman? There is nothing unusual
14 about it.

15 I will ask the clerk, then, to deliver this verdict
16 list to Mrs. Taxman and I will ask him after that to swear
17 the marshal.

18 Oh, there is one further duty that I have. I
19 remember that Mr. Whitman asked me when we started the trial
20 in this case what an alternate juror did. Now, Mr. Whitman,
21 yes, you have now done what an alternate juror does. You
22 have sat through the entire trial. And since all 12
23 of the regular jurors are here, it is with regret in the
24 sense that I excuse, but also with very deep thanks that
25 I excuse, you and Mr. De Carlo. The law doesn't permit

the alternate jurors to deliberate with the regular jurors but only to substitute for them if any of them are absent.

I hope that you won't feel frustrated in not being able to deliberate, but I certainly do thank you and Mr. De Carlo for the really exceptional behavior that you and all the other members of this jury showed. Counsel said it and I've heard counsel butter up juries before, but I'll do it this time and I have nothing to gain. And it is true; this has been the promptest, most regular, most attentive jury that I've seen in the court in a long time, and I am now beginning to have been here long enough to be entitled to say that.

Thank you, gentlemen, and you two are excused.

(Two alternate jurors discharged.)

(A United States Marshal was sworn.)

THE COURT: Ladies and gentlemen, you may now commence your deliberations. I want to tell you ladies and gentlemen that I will make arrangements, which I believe we can do here in court, if you go home after dark, for transportation in a car. So you need not be concerned. We can arrange that.

All right, ladies and gentlemen, you may commence your deliberations, please, and I will see counsel in the robing room.

(At 3:42 P.M. the jury retired to commence their deliberations.)

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2 (In the robing room.)

3 THE COURT: Gentlemen, before we go to your
4 objections, I would like to say that I will go up to
5 chambers as soon as we are finished with the motions or
6 whatever they are.

7 As far as exhibits are concerned, I don't see
8 any reason why there should be any problem. If the jury
9 asks for any exhibit, I assume you will be able to agree
10 and just let the clerk give it to the marshal.

11 If any questions are asked with regard to my
12 charge, or any other legal questions, I will of course come
13 down and answer them after having conferred with you.

14 If there are requests for the reading of any
15 portion of the record or the playing of any tapes, I would
16 like to ask you to do the leg work necessary to locate
17 the information before I come down. And where in your
18 opinion there is no real question as to what the jury wants
19 to hear, I would just as soon not come down to hear it.
20 But if you feel that there are going to be questions that
21 I have to decide as to whether more or less should be read
22 or whether the cross-examination should be read, of course
b5 23 I will come down.

24 MR. LANNA: I will move at this time for the
25 withdrawal of a juror and a mistrial as a result of the

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2 closing argument of the government, more specifically as
3 to two points.

4 I feel that Mr. Truebner made himself an unsworn
5 witness and also was inflammatory and prejudicial when
6 he designated positions as to the so-called "board."

7 THE COURT: I thought that was beautiful.

8 MR. LANNA: I thought that was completely uncalled
9 for. We have only ourselves to blame for it. I don't
10 recall which defense counsel raised it. But I don't think
11 that gave Mr. Truebner the right to become a so-called
12 unsworn witness and designate the positions on the "board."

13 THE COURT: I thought it was fair comment.

14 MR. LANNA: In addition I thought it was in-
15 flammatory and prejudicial when he at the very conclusion
16 of his argument played, I think, on the prejudice of the
17 jury relative to ridding ourselves in this area of the
18 country of the narcotics problem and that an acquittal of
19 course would only license these individuals, and I'm using
20 the words in substance now, to return to Williams Island.

21 THE COURT: I would have preferred that there
22 had been no reference to the narcotics, and I saw you and
23 Mr. La Rossa shaking your heads, and maybe I would have
24 preferred it just because I did see you shaking your heads,
25 but I believe that I emphasized to the jury the fact that

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2 they should disregard what the subject matter of the
3 indictment was, and in any event I didn't find Mr. Truebner's
4 remark prejudicial, although I thought it was perhaps
5 a little poorly chosen.

6 I think it is only fair to the government for
7 me to observe, in case an appellate judge reads what I
8 am now saying, that I felt that Mr. Truebner's summation
9 was made in a very calm, dispassionate tone and that that
10 is something which must be taken into consideration by
11 the trial judge in reaching a decision on these matters.

12 MR. THAU: I would make a motion similar to Mr.
13 Lanna's on the ground that in this case, particularly where
14 both sides had daily copy, I think that has some bearing
15 on it, and therefore where every attorney here was more
16 conscious of what the evidence was than in the run of the
17 mill case, and where my client's name does not appear
18 in the evidence past the March trip, Mr. Truebner chose
19 to say that after March the whole bunch of them, undaunted,
20 marched right ahead and continued, and further went on to
21 describe my client as some sort of executive officer on
22 this "board," keeping in mind that this so-called board
23 meeting was not held until June or July, several months
24 after my client's last appearance in the evidence.

25 THE COURT: Okay. I disagree with you, Mr. Thau,

1 Jgh21

2 but I understand your position.

3 Mr. Shaw, you have to have the last word.

4 MR. SHAW: Sorry, your Honor.

5 Just to expand on the point that Mr. Lanna
6 so eloquently made, I would point out to the court that
7 the President's Commission on Marijuana has decreed that
8 marijuana is not a narcotic, and I think that that remark
9 was out of order.

10 And I made several objections earlier in the
11 case, two in regard to what learned counsel Mr. Thau said.
12 I object to the fact that Mr. Truebner read from the record
13 something that I specifically noted in my summation
14 yesterday that the witness changed his testimony in regard
15 to, and that is where there was testimony on the part
16 of Richard Thurlow that my client was speaking or that
17 they were conversing about certain points A, B and C in
18 running against patrol boats.

19 There was specific testimony in the record
20 by Thurlow that, no, we didn't have a conversation, and
21 thereafter by Mitchell, who stated unequivocally there was
22 no conversation.

23 THE COURT: Very good.

24 Cheer up. Everybody may be acquitted.

25 I just want to tell you, gentlemen, that if

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2 has been a pleasure to work in this case with you. It was
3 not the easiest case in the world, for reasons none of us
4 had control over, but it was a very interesting case. And
5 whatever the outcome, I enjoyed working with you.

6 (In open court in the absence of the judge and
7 jury.)

8 MR. SPARROW: After conferring with Judge Lasker
9 as to the possibility of a verdict so far as the defendant
10 Nick Calabro is concerned, it is agreeable to the defendant
11 and I enter a stipulation on the record that either Mr.
12 La Rossa or Mr. Lanna may take the verdict on behalf of this
13 defendant in the absence of myself.

14 Is that agreeable with you, Mr. Calabro?

15 DEFENDANT CALABRO: Yes, it is.

16 MR. SPARROW: Thank you.

17 Similarly, the two named defense counsel may act
18 on my behalf in responding to any inquiry made by the jury
19 pertaining to this defendant along with the others.

20 (At 6 P.M., a note was received from the jury.)

21 (In open court in the absence of the judge; jury
22 present.)

23 THE CLERK: Ladies and gentlemen, I received your
24 note. I was informed by the judge to give the indictment,
25 which I did, and have the court reporter read the part of

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the transcript that you requested. I will read it. As soon as you have what you want, let us know and we will stop.

(A portion of the direct examination of the witness Palmer was read to the jury.)

THE CLERK: Madam forelady, is that enough?

THE FORELADY: Yes. Thank you very much.

(At 6:05 P.M. the jury returned to the jury room to continue to deliberate upon a verdict.)

(Court Exhibit 2 marked for identification.)

(At 9:10 P.M., a note was received from the jury.)

(In the robing room; counsel present.)

THE COURT: "The jurors would like to know the following:

"Would it be possible for a defendant to be found not guilty on the first count and guilty on the second count?

"Second. May we see the hotel registration and airline ticket exhibits."

I invite your comments on the first question.

MR. LA ROSSA: Yes.

MR. LANNA: Yes.

MR. ABRAMOWITZ: The answer is yes.

THE COURT: I agree with you.

MR. THAU: Not to each of the defendants as I see it.

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2 THE COURT: Those who are charged and not been
3 acquitted.

4 MR. LA ROSSA: Yes.

5 THE COURT: I can't use the word acquitted, but
6 those whose cases still remain before them.

7 All right. Would you bring in the jury, please,
8 and I will answer these questions.

9 Will you, Mr. Truebner, arrange to get the
10 exhibits?

11 MR. TRUEBNER: Yes, your Honor.

12 (At 9:20 P.M., in open court; jury present.)

13 THE COURT: Good evening.

14 I hope you are not tired and have had a very
15 satisfactory dinner.

16 I have received your note, which I will ask the
17 court clerk to mark as a court exhibit after I finish dis-
18 cussing it.

19 "Your Honor, the jurors would like to know the
20 following:

21 "Would it be possible for a defendant to be found
22 not guilty on the first count and guilty on the second count?"

23 The answer to that question is yes, with the
24 following proviso, that is, of course, it would only be
25 to those who are named there in count 2 and with the

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2 exception of Mr. Calabro and Mr. Smith.

3 The second part of your note says, "May we see
4 the hotel registration and airline ticket exhibits."

5 I have asked the clerk to make those available to
6 you, which he will do in just a moment.

7 Will you return to the jury room and continue
8 your deliberations.

9 (Court Exhibit 2 marked for identification.)

10 (At 9:25 P.M., the jury returned to the jury room
11 to continue to deliberate upon a verdict.)

12 MR. THAU: Pardon me, your Honor.

13 THE COURT: Mr. Thau?

14 MR. THAU: Yes.

15 Your Honor recalls that I asked you when your
16 Honor consulted us about the note in the afternoon, most
17 of the counsel's answers to the questions that I asked
18 remember my saying, "Not as to the questions that I asked,
19 of course, we came in here on the basis of the questions
20 tions, the answer to the jury.

21 It occurs to me in Mr. Thau's question that I gave
22 the answer ought to have been no.

23 You will recall that I asked you whether or not
24 ever concerning him after the verdict was returned,
25 which if he were admitted to the bar, he would be

1 gth

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2 such possession as there was in May could not be in further-
3 ance of a conspiracy of which he was acquitted.

4 As to the aiding and abetting, certainly since
5 there was no evidence concerning any such aiding and abetting
6 concerning that May possession that is out, and certainly no
7 one here contends on his part there was any actual possession
8 at Rye Town.

9 THE COURT: The only comment I can make is that
10 it should be a finding that Mr. Belanger or anybody else
11 is guilty on count 2 and counsel urge me to review the
12 evidence and to indicate I have made an incorrect ruling, I
13 would do so and correct the situation at that time.

14 MR. THAU: Thank you, your Honor.

15 THE COURT: Gentlemen, I will be in chambers.

16 I wanted to say it is my plan to let the jury go
b2 17 about 10 o'clock.

18 (At 9:50 P.M., in open court; jury present.)

19 THE COURT: Mrs. Taxman, I understand the jury has
20 reached a verdict, is that correct?

21 THE FORELADY: Yes.

22 THE COURT: I will ask the clerk to call your names
23 and to receive the verdict.

24 (Jury roll called; all present.)

25 THE CLERK: Madam forelady, has the jury reached a

1 Find

2 Verdict?

3 THE FORELADY: Yes, we have.

4 THE CLERK: How do you find for Richard Belanger
5 on count 1?

6 THE FORELADY: We find Richard Belanger guilty.

7 THE COURT: On count 1?

8 THE FORELADY: On count 1.

9 THE CLERK: And Richard Belanger on count 2?

10 THE FORELADY: Guilty.

11 THE CLERK: Nicholas Calabro on count 1?

12 THE FORELADY: Not guilty.

13 THE CLERK: Steven Smith on count 1?

14 THE FORELADY: Not guilty.

15 THE CLERK: Gary Stephan on count 1?

16 THE FORELADY: Not guilty.

17 THE CLERK: Gary Stephan on count 2?

18 THE FORELADY: Not guilty.

19 THE CLERK: Paul Stephan on count 1?

20 THE FORELADY: Not guilty.

21 THE CLERK: Paul Stephan on count 2?

22 THE FORELADY: Not guilty.

23 THE CLERK: Robert Vissa on count 1?

24 THE FORELADY: Guilty.

25 THE CLERK: Robert Vissa on count 2?

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2 THE FORELADY: Guilty.

3 THE CLERK: Richard Wilner on count 1?

4 THE FORELADY: Guilty.

5 THE CLERK: Richard Wilner on count 2?

6 THE FORELADY: Guilty.

7 THE CLERK: Ladies and gentlemen of the jury,

8 listen to your verdict as it stands recorded.

9 You say you find the defendant Richard Belanger
10 guilty on count 1 and count 2; you find Nicholas Calabro
11 not guilty on count 1; you find Steven Smith not guilty on
12 count 1; you find for Gary Stephan on count 1 not guilty,
13 on count 2 not guilty; you find for Paul Stephan on count 1
14 not guilty, on count 2 not guilty; on Robert Vissa, on
15 count 1 you find guilty, on count 2 you find guilty; on
16 Robert Wilner on count 1 guilty, on count 2 guilty. And so
17 say you all.

18 THE FORELADY: We do.

19 MR. LA ROSSA: I ask that the jurors be individually
20 polled, may it please the court.

21 THE COURT: All right. Please poll the jurors.

22 THE CLERK: Ladies and gentlemen of the jury,
23 listen to your verdict as it stands recorded.

24 THE COURT: I don't think you need to repeat it,
25 simply ask each of the jurors if the verdict announced is

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2 their verdict.

3 (Each juror, upon being asked, "Is that your
4 verdict?" answered in the affirmative.)

5 THE COURT: Ladies and gentlemen, it is a solemn
6 moment. I want to express again my appreciation for
7 the sense of responsibility with which you have discharged
8 your duties.

9 I don't for a moment under-estimate the difficulty
10 of reaching the verdict that you have reached. I have to do
11 the same job myself from time to time when I try people
12 without a jury. I again thank you for the faithfulness
13 with which you have served. I trust that you will leave this
14 building believing that the American system of justice does
15 its best, which is all that anybody can ask, and we come
16 as close as possible to human truth.

17 Thank you very much. You are discharged with the
18 thanks of the court.

19 (Jury discharged.)

20 (In the robing room; counsel present.)

21 THE COURT: Mr. Hoffman, counsel whose clients
22 have been acquitted are excused. Again, I say it was nice to
23 work with you and I am glad for you and Mr. Smith and for
24 me that we avoided some of those thorny questions which you
25 have posed.

MR. HOFFMAN: Thank you. It has been a pleasure.

(In open court.)

THE COURT: Gentlemen, I think we have to set a sentencing date.

Mr. Clerk, I think July is seven weeks from today.

That will be July 12th, at 10 A.M. in room 2703.

At least it is the 27th floor, I am not sure which of the two courtrooms I will be in.

I wish to address Mr. Wilner and Mr. Vissa and Mr. Belanger.

Gentlemen, I take it that the government will not object to continuing your present bail arrangements. Is that correct?

MR. TRUEBNER: That is correct, your Honor, no objection.

THE COURT: But you are responsible to appear before the Probation office of this court at the beginning of next week in accordance with arrangements to be made by counsel to commence the pre-sentence investigation and, of course, you are responsible to appear for sentence on July 12th at 10 o'clock in the morning.

I don't expect you not to appear, but any failure to appear will constitute a separate crime which will be separately punishable and you should know that.

MR. THAU: Thank you, your Honor.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

ROBERT VISSA,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

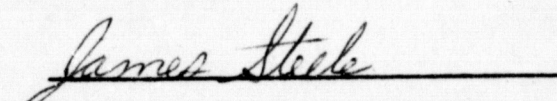
I, James Steele, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 27th day of March 1975 at Federal Courthouse, Foley Square, N. Y. N. Y.

deponent served the annexed *Appendix* upon

Paul J. Curran, U.S. Attorney, Southern District

the Attorney in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 27th
day of March 1975


JAMES STEELE

ROBERT T. DRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975